N THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA

WRS, INC., d/b/a WRS MOTION PICTURE LABORATORIES, a corporation Plaintiff, v. PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an Individual and JOHN HERKLOTZ, an individual Defendants	)	No. 2:00-CV-2041-AJS

AFFIDAVIT OF JOHN W. GIBSON IN SUPPORT OF DEFENDANT CHARLES VON BERNUTH'S REQUEST FOR RELIEF UNDER FED. R. CIV. P. 60

1. My name is John W. Gibson and I have a business address at 20 Chatham Square, Pittsburgh, Pennsylvania, 15219-4731.

2. I am making this Affidavit based upon my own personal knowledge of the facts set forth herein and in support of the Motion for Relief under Fed R. Civ. P. 60 that has been filed by Charles Von Bernuth in this action.

3. I am an attorney and member of the Bar of the Supreme Court of Pennsylvania and of the United States District Court for the Western District of Pennsylvania. My Pennsylvania Attorney ID number is 32166.

4. I have been defense counsel for Charles Von Bernuth ("Mr. Von Bernuth") in this case throughout the pendency of the matter. At no time have I withdrawn my appearance for Mr. Von Bernuth.

5. I also represented Defendants Plaza Entertainment, Inc. ("Plaza") and Eric Parkinson. Again, at no time have I withdrawn my appearance entered on behalf of those Defendants.

6. This case has had a long and protracted procedural history which included a prior appeal to the United States Court of Appeals for the Third Circuit after the case had been dismissed by Judge Standish.

7. Following and as a result of the proceedings in that appeal, on July 29, 2005, Judge Standish entered an order granting a motion by Plaintiff WRS, Inc. ("WRS") to reopen this case.

8. As a result of Judge Standish's illness, the case was reassigned to Judge Schwab, first on an interim and then on a permanent basis.

9. On March 9, 2006, I attended a status/settlement conference conducted by Judge Schwab in the matter. At that conference, Judge Schwab set March 23, 2006 as the date for parties to file motions for summary judgment in the case. Judge Schwab also determined that the parties should at their equal cost employ Schneider Downs as an accountant to review WRS' account records, which were in dispute in the matter.

10. At that conference I stated an intention to file a Motion for Summary Judgment based on the statute of limitations by the March 23, 2006 deadline set by the Court.

11. As my clients were expected to pay one-third of the cost of the work by Schneider Downs, I advised Mr. Von Bemuth following the conference that a contribution from him for these accountant fees would be expected. At the time, the amount of each party's contribution to payment of Schneider Downs had not been set and I told Mr. Von Bernuth I would let him know what payment would be required from him.

12. Mr. Von Bernuth did not raise any objection to paying a portion of the accountant's fee and said to let him know when payment was required.

13. I was working for my clients on an hourly rate basis. Given that I was a jointly defending multiple parties, with respect to each of the bills for my time and expenses Mr. Von Bemuth was to pay half of the bill and Eric Parkinson was to pay the other half of the bill.

14. Mr. von Bemuth has always faithfully made payments for his portion of the bill.

15. Mr. Parkinson, on the other hand, had not been paying his portion of the bills and his account had fallen into significant arrearage.

16. The practical effect of this is that was I was doing the work on the case at half my normal rate. I had advised Mr. Von Bemuth of this problem.

17. This circumstance ultimately led me to neglect my duties in the case because of Mr. Parkinson's lack of payment.

18. I did not prepare a summary judgment motion as I had stated I would at the settlement conference of March 9, 2006.

19. I did not follow up with Mr. Von Bernuth concerning payment of the accountant's fee, an amount which ultimately turned out to be $5,000.

20. On April 12, 2006 (Doc. No. 98) WRS filed a Motion to Show Cause Why a Default Should Not Be Entered as to Defendant Charles Von Bernuth.

21. The Motion recited the failure to file a Motion for Summary Judgment and the failure to make a payment of a portion of the accountant's fee as a purported basis for concluding that Mr. Von Bernuth no longer intended to defend the matter.

22. I failed to notify Mr. Von Bernuth of the filing of this Motion.

23. I did not file any response to this Motion.

24. On April 18, 2006, Judge Schwab signed an Order (Doc. No. 99) requiring Mr. Von Bernuth to show cause why he should not be defaulted. A response date of April 25, 2006 was set.

25. I failed to advise Mr. Von Bernuth of the filing of this Order and I did not respond to the Order.

26. On April 28, 2006 (Doc. No. 100), the Court directed the Clerk to enter a default under Rule 55(a) against Mr. Von Bemuth. On that same day a default was entered as to Mr. Von Bemuth.

27. I did not advise Mr. Von Bemuth of the entry of a default.

28. I did not take any action on behalf of Mr. Von Bemuth to open the default or have the matter reconsidered.

29. On October 13, 2006, a Motion for Default Judgment (Doc. No. 118) was filed against Mr. Von Bemuth as well as against Defendants Plaza and Eric Parkinson, who had also by this time been defaulted. The Motion sought to fix the amount of Mr. Von Bemuth's liability in excess of $2.5 Million.

30. Again, I failed to notify Mr. Von Bemuth of the filing of this Motion. I also failed to make any response to the Motion on his behalf.

31. On February 20, 2007 (Doc. No. 140) the Court entered an Order granting a judgment against Mr. Von Bemuth in the sum of $2,584,749.03.

32. On that same day, a summary judgment (Doc. No. 139) was entered against another Defendant, John Herklotz who had, through his counsel, been actively defending the matter. The judgment against Mr. Herklotz was in the same amount of $2,584,749.03.

33. On March 8, 2007 (Doc. No. 142), Mr. Herklotz filed a notice of appeal from the February 20, 2007 Order which entered judgment against him.

34. I did not file any notice of appeal on behalf of Mr. Von Bernuth from the February 20, 2007 Order directing judgment against him, and I do not believe there is yet any final judgment in this case.

35. On May 21, 2007, I received a copy of an e-mail which Eric Parkinson had sent to Mr. Von Bernuth. In the e-mail, Mr. Parkinson was expressing surprise that this matter had not been terminated in his favor. That e-mail is attached hereto as Exhibit 1 hereto.

36. Exhibit 1 also contains my e-mail response to Eric Parkinson where I advised Eric Parkinson, for the first time, that default judgments had been entered against him and against Mr. Von Bernuth.

37. As expressed in my e-mail, I thought that in connection with the appeal, the Court of Appeals would disapprove of and reverse the entry of default judgments against Mr. Von Bernuth and Eric Parkinson where they had Answers on file raising defenses.

38. While I still believe that it was error for the District Court to take such action, I understand that my own dereliction in failing to oppose the entry of judgment by default and my failure to point out to the District Court its error in entering a default under the circumstances has caused the need for my client Mr. Von Bernuth to seek Rule 60 Relief from this Court.

39. I have no excuse for my failure to properly defend clients for which I had entered an appearance that has never been withdrawn.

40. In the case of Mr. Von Bernuth, he always faithfully paid me for my services, and he had not indicated any problem or difficultly in paying his share of the accountant's fee.

41. Furthermore, there is no excuse for my conduct in failing to keep Mr. Von Bernuth informed and advised that a default was being entered against him and later that his liability was being fixed in an amount in excess of $2.5 Million without opposition by me.

42. My failure to advise Mr. Von Bernuth of these developments deprived him of the opportunity to hire other counsel to defend his interests.

43. Based on my handling of this case over a number of years, I believe there are meritorious defenses to the claim asserted by WRS, including defenses based on WRS's own failure to follow its agreements with Plaza and based on WRS's inability to prove through its records and witnesses that any amounts were owed to it.

44. Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the facts set forth in this Affidavit are true and correct based upon my own personal knowledge thereof.

EXECUTED ON AUGUST 16, 2007

John W. Gibson, Esquire

EXHIBIT "1"

Subj: RE: WRS Lawsuit with Plaza Ent., Inc.
Date: 5/21/2007 2:14:41 P.M. Central Standard Time
From: johngibson@hotmail.com
To: EricParkinson1@aol.com

Hi Eric:

Actually it is the opposite. Judge Schwab entered an enormous judgment against Plaza Entertainment and against Mr. Herklotz. There is an appeal pending in the Third Circuit by Mr. Herklotz. The Judge's basis for entering judgment against you and Mr. von Bemuth was that you did not advance funds to pay the accountants and he entered judgment "by default." That is probably the strongest basis for an appeal since answers were filed and there is an abundance of case law that says that it is improper to enter a judgment for that reason.

I haven't reviewed the accountants' reports but it seems strange to me since the accounting at WRS was, in fact, a total mess.

I did not move to withdraw my appearance for anyone in the District Court and I still can enter my appearance in the Third Circuit but this is going to involve considerable work and I can't afford to do it at half my hourly rate. If you are able to bring your bill current, please let me know and I will enter my appearance in the appeal and will resume billing.

Thank you.

John

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From: EricParkinson1@aol.com
To: c.bemuth@verizon.net
CC: diana@janddlaw.com, johngibson@hotmail.com
Subject: WRS Lawsuit with Plaza Ent., Inc.
Date: Mon, 21 May 2007 14:48:09 EDT
MIME-Version: 1.0
Received: from imo-m26.mx.aol.com ([64.12.137.7]) by bay0-mc6-f5.bay0.hotmail.com with Microsoft SMTPSVC(6.0.3790.2668); Mon, 21 May 2007 11:48:43 -0700
Received: from EricParkinson1@aol.com by imo-m26.mx.aol.com (mail_out_v38_r9.2.) id 6.d00.10136fff (43930);Mon, 21 May 2007 14:48:09 -0400 (EDT)

Charles – did you speak with John Gibson yet? The last documents I have from the WRS - Plaza matter was that they case was dismissed because the accounting at WRS was such a shambles that there was no way to prove how much they had billed, collected for Plaza, etc. To the best of my knowledge, you and I and Plaza (and Herklotz?) were 100% released from the case. Is that your understanding???

Please advise.

ERIC PARKINSON
818-481-5277